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No. 89-1198

In the Supreme Court of the United States

OCTOBER TERM, 1989

ERIC MARROQUIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the periods of delay that are excluded from the maximum time limits for commencing trial under the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, are also excluded from the 30-day defense-preparation period during which trial may not commence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 885 F.2d 1240. The findings of the district court (Pet. App. 17a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1989. A petition for rehearing was denied on October 30, 1989 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on January 26, 1990, and is therefore out of time under Rule 20.1 of the former version of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on 24 counts charging mail fraud and conspiracy, in violation of 18 U.S.C. 1341 and 371. He was sentenced to a total of 25 years' imprisonment and he was fined a total of $100,000. He was also ordered to make restitution in the total amount of $198,000. The court of appeals affirmed.

1. The evidence at trial, which is not in dispute, showed that petitioner engaged in a scheme to defraud insurance companies. Petitioner bought insurance policies on race horses, falsely inflating the purchase price of each horse. Shortly after the policy issued, petitioner reported the horse dead or stolen, and collected the insurance proceeds. To carry out his scheme, petitioner enlisted the help of others who either served as straw owners for the horses or provided him with the false documents needed to substantiate the inflated worth of the horses for his insurance claims. Gov't C.A. Br. 3-11.

2. A 58-count indictment returned on June 8, 1987, charged petitioner and six others with mail fraud and conspiracy. Petitioner first appeared with counsel on these charges on June 18, 1987. Thereafter, superseding indictments were returned on August 7 and 28, 1987. Jury selection began on October 19, 1987. On that day, petitioner filed a motion to dismiss the indictment for a violation of the 70-day limit of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* The district court denied the motion, finding that only 24 nonexcludable days had passed since the indictment. On October 26, 1987, petitioner moved to discharge the jury (which had not yet been sworn) on the ground that he had not been accorded the minimum 30-day defense-preparation period that is provided for in Section 3161(c)(2) of the Act. The following day, the district court

postponed the start of trial until November 2, 1987, to give petitioner some additional preparation time. Trial was postponed for one additional day to November 3, 1987. The jury was sworn on that day. Pet. App. 2a; Gov't C.A. Br. 2-3, 13, 17.

3. The court of appeals affirmed. The court rejected petitioner's argument that trial commenced less than 30 days from the date on which he first appeared with counsel. The court held that the 30-day preparation period guaranteed by Section 3161(c)(2) is 30 calendar days, and that the periods of excludable delay enumerated in Section 3161(h) do not enlarge the 30-day minimum defense-preparation period. The court pointed to the language of Section 3161(h), which states that certain periods of delay "shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence." Pet. App. 4a-5a. Section 3161(h) contains no language suggesting that it applies to the minimum defense-preparation period, however. Pet. App. 4a-5a. Furthermore, the court observed, whenever Congress wished the exclusions to apply, "it said so in clear and unmistakable language." Pet. App. 5a, citing Section 3161(d)(2). The court acknowledged that the 1979 Senate Report states that the exclusions apply to Section 3161(c)(2) (see S. Rep. No. 212, 96th Cong., 1st Sess. 32 (1979)), but the court did not find that legislative history compelling. The court noted that there was no similar statement in the House Report (see H.R. Rep. No. 390, 96th Cong, 1st Sess. (1979)), and that the courts and advisory guidelines have not so construed the statute. Pet. App. 6a. The court further observed that such a reading of the statute does not place defendants at a disadvantage because a "defendant may still be granted a continuance on any appropriate ground." Pet. App. 7a. Finally, the court observed the even if Section 3161(c)(2) was violated, petitioner is not entitled to relief because he was not prejudiced by the failure to delay his trial. Pet. App. 7a.

ARGUMENT

Section 3161(c)(2) provides that "[u]nless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." Petitioner's trial began 123 days after his first appearance through counsel (June 18 to October 19). He contends, however, that the 30-day period is not to be measured in calendar days, but that it is extended by the periods of excludable delay set forth in Section 3161(h) of the Speedy Trial Act. The court below, like every other appellate court that has considered the issue, properly concluded that the defense-preparation period is calculated without reference to the Section 3161(h) exclusions. Accord *United States* v. *Mastrangelo*, 733 F.2d 793 (11th Cir. 1984); *United States* v. *Wooten*, 688 F.2d 941 (4th Cir. 1982).

As originally enacted, Title I of the Speedy Trial Act of 1974 set only outside time limits within which a criminal case had to be tried. See 18 U.S.C. 3161(c) (1976). The statute set no limit on the degree of expedition permitted. To ensure that defendants are not rushed to trial without an adequate opportunity to prepare, Congress amended the Act in 1979 to provide both a maximum time limit for commencing trial (70 days from the indictment or the defendant's first court appearance) and a minimum time period during which trial may not commence (30 days from the defendant's first court appearance with counsel). Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, § 3, 93 Stat. 327. See *United States* v. *Rojas-Contreras*, 474 U.S. 231 (1985).

The language chosen by Congress makes clear that the 70-day maximum time limit and the 30-day defense-preparation period are not to be calculated in the same

manner. Section 3161(h) excludes certain periods when calculating the last permissible date for returning an indictment or starting trial: "[t]he following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed [30 days from an arrest on federal charges], or in computing the time within which the trial of any such offense must commence [usually 70 days from indictment]." Likewise, Sections 3161(d)(2) and 3161(e), which sets maximum time limits for bringing a defendant to trial following reinstatement of an indictment or the grant of a new trial, also state explicitly that "[t]he periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in [these] section[s]". In contrast, the Act does not state that the periods of delay enumerated in Section 3161(h) are excluded when computing the 30-day defense-preparation period. The difference in language clearly indicates that the defense-preparation period should be measured in calendar days.

To support his argument that the mandatory defense-preparation period is not measured in calendar days, petitioner relies on the 1979 Senate Report, which states that it is "the Committee's intent that the exclusions provided in section 3161(h) apply to the 30-day minimum to-trial provision" (see S. Rep. No. 212, *supra*, at 32). The force of that single statement, however, is undermined not only by the plain language of the statute, but also by other features of the legislative history.

First, the House Report on the legislation contains no similar suggestion that the method of calculating the two periods should be the same. See H.R. Rep. No. 390, *supra*. Second, Section 3161(c)(2) was derived from a set of guidelines issued by the Judicial Council of the United States Court of Appeals for the Second Circuit. *United States* v.

Rojas-Contreras, 474 U.S. at 235-236; see *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 122, 386-436 (1979). Those guidelines provide that the trial court should liberally grant a defendant's request for a continuance whenever trial is scheduled within the first 30 days following arraignment. *Id.* at 392-393. The Second Circuit guidelines do not mandate such a continuance where trial is scheduled after the first 30 calendar days but within the first 30 nonexcludable days.

The policies underlying the Speedy Trial Act also strongly support the construction of the statute adopted by the court below. The Act was designed to require that criminal cases be processed more expeditiously, consistent with the defendant's right to a fair trial. The exclusions of various periods of delay from the 70 days allotted for commencement of trial were put into the statute to provide the flexibility needed to accommodate complex cases and unavoidable delays. The 30-day minimum defense-preparation period was included to ensure that the defense would have at least 30 days between indictment and trial to prepare to meet the charges. The excludable delay provisions recognize that, for example, a court may need extra time to decide pretrial motions and therefore will not be able to begin the trial within 70 days of the indictment. There is no reason, however, to extend the defense-preparation period in which trial may not begin in the same way that the 70-day maximum time limitation is extended, since the fact that the court may need extra time to decide pretrial motions does not mean that the defense needs the same period of extra time to prepare for trial. In short, it would be entirely inconsistent with the purposes of the Speedy Trial Act to require that any time a trial *may* be delayed, it *must* be delayed.

Construing Section 3161(c)(2) as written does not give rise to a due process violation, as petitioner intimates (Pet.

14-15). As this Court made clear in *United States* v. *Rojas-Contreras*, *supra*, Section 3161(h)(8)(B)(iv) of the Act "places broad discretion in the District Court to grant a continuance when necessary to allow further preparation." 474 U.S. at 236. In this case, the district court did not abuse its broad discretion; even though petitioner did not seek a continuance until after jury selection had begun, the court nonetheless accommodated petitioner's request by granting an eight-day continuance before swearing the jury. Petitioner does not suggest how he was prejudiced by the district court's failure to provide an even longer continuance either earlier or at that time.*

None of the cases cited by petitioner conflicts with the decision below. For example, *United States* v. *Castellano*, 848 F.2d 63 (5th Cir. 1988), did not involve the defense-preparation provision, Section 3161(c)(2). In that case, the court merely noted that the periods of delay enumerated in Section 3161(h) are excluded from calculating both the 30-day time limit for obtaining an indictment (Section 3161(b)) and the 70-day time limit for commencing trial (Section 3161(c)(1)). Likewise, *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983); *United States* v. *Harris*, 724 F.2d 1452, 1454 (9th Cir. 1984); and *United States* v. *Karsseboom*, 871 F.2d 877, 879 (9th Cir. 1989), do not help

* Because petitioner was not prejudiced by the district court's decision to commence trial on November 3, 1987, he would not be entitled to any relief on appeal even if Section 3161(c)(2) were violated. *United States* v. *Grosshans*, 821 F.2d 1247, 1252-1253 (6th Cir.), cert. denied, 484 U.S. 987 (1987). But see *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983) (awarding defendant a new trial). The Speedy Trial Act contains no sanction for violations of this provision. See 716 F.2d at 1506 (holding that the Act's dismissal sanction for a violation of the maximum time limits does not apply to violations of Section 3161(c)(2)). Accordingly, in the absence of a statutory sanction or prejudice, any error must be deemed harmless. *United States* v. *Hasting*, 461 U.S. 499, 509 (1983).

petitioner, because none of those cases considered the applicability of the exclusions to the defense-preparation period. In *Daly*, the court discussed the starting date for the defense-preparation period where a defendant obtains new counsel following arraignment. In *Harris*, the court held that a defendant must receive a new preparation period following the return of a superseding indictment. This Court held to the contrary in *Rojas-Contreras*. And in *Karsseboom*, after noting that both the 30-day preparation period and the 70-day indictment-to-trial period should be calculated with reference to the original indictment, the court of appeals held that trial commenced too late, not too soon. In short, no case adopts the position urged by petitioner, namely, that the 30-day preparation period is lengthened automatically by excludable delay. Further review of this question is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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